# Lee Lian Teng Dan Lain-Lain lwn Liew Kon Min Dan Lain-Lain

MAHKAMAH TINGGI (KUALA LUMPUR) —
PEMBERITAHU PERMULAAN NO 32-72-88
ABDUL RAZAK H
10 OGOS 1989

*Tuan Tanah dan Penyewa — Tuntutan oleh tuan tanah mendapat balik hartanya — Dibenarkan atas syarat pampasan dibayar kepada penyewa*

*Undang-undang Tanah — Lesen ekuiti — Rayuan mengenai jumlah pampasan — Penyewa tidak menyerahkan balik rumah - Tuntutan mendapat 'mesne profit' atau gantirugi — Hak penyewa dari segi undang-undang telah berakhir*

Di dalam kes ini, pihak plaintif telah membuat tuntutan untuk mengusir pihak defendan dari tanah kepunyaannya. Mahkamah, pada 28 Oktober 1983, telah memutuskan bahawa defendan mempunyai lesen ekuiti menduduki tanah plaintif dan tidak boleh diusir melainkan setelah pampasan dibayar. Ini bermakna setelah mahkamah memutuskan bahawa pampasan hendaklah dibayar, maka dari saat itu hak defendan menetap di tanah plaintif sudah luput. Bagaimanapun defendan masih terus menetap di tanah tersebut kerana ia telah membuat rayuan kepada Mahkamah Agung. Ternyata rayuannya berkenaan dengan jumlah pampasan itu sahaja. Plaintif menuntut 'mesne profit'.

**Diputuskan,** membenarkan permohonan plaintif:
Defendan dikenakan membayar 'mesne profit' dari tarikh 28 Oktober 1983 hingga tarikh ia berundur dari tanah tersebut.

[In this case, the plaintiffs had brought an action to recover land in the occupation of the defendants. The court, on 28 October 1983, ruled that as there was an equitable licence the land can only be recovered on payment of compensation. The defendants continued to occupy the land after the judgment, as they had appealed to the Supreme Court. The appeal, however, was only with regard to the amount of the compensation. The plaintiffs claimed mesne profits. It was held that the plaintiffs were entitled to mesne profits from 28 October 1983 till the time the defendants vacated the land.]

[*Nota Penyunting*: Pihak defendan telah merayu kepada Mahkamah Agung menerusi Rayuan Sivil No 02-295-1989.]

**Kes-kes rujukan**
1 *Inward* v *Baker* [1965] 2 QB 29 (diikut)
2 *Mok Deng Chee* v *Yap See Hoi* [1981] 2 MLJ 321 (diikut)

*AP Sivam* bagi pihak plaintif.
*CS Saini* bagi pihak defendan.

*Cur Adv Vult*

**Abdul Razak H**: Permohonan di hadapan saya adalah bersabit dengan satu perkara sahaja, iaitu samada plaintif berhak mendapat 'mesne profit'. Pihak plaintif berkata ia berhak mendapat 'mesne profit' dari masa ia memberi notis kepada defendan meminta ia keluar dari tanahnya. Pihak defendan berkata bahawa ia tidak diharuskan keluar selagi pampasan belum dibayar.

Saya perhatikan di dalam hujahnya pihak peguam plaintif menafikan bahawa pihak defendan tidak boleh diusir selagi wang pampasannya belum dibayar, dan dia berpendapat pampasan tidak perlu dibayar dan enggan membayar. Pihak defendan pula merujuk kepada kes *Inward* v *Baker*[1] dan *Mok Dong Chee* v *Yap See Hoi*[2] dan menyatakan bahawa suatu lesen ekuiti wujud. Saya telah menerima pendapat itu di dalam keadaan-keadaan yang didedahkan. Saya juga telah memutuskan atas prinsip itu bahawa pihak defendan adalah berhak, sebagai penduduk yang mempunyai lesen ekuiti, menduduki tanah plaintif dan boleh diusir cuma apabila wang pampasan telah dibayar. Tetapi, adakah di dalam pada itu 'mesne profit' masih boleh dikenakan terhadap pihak defendan? Pihak plaintif berkata ini boleh kerana bila kes ini mula-mula dihadapkan kemahkamah, pihak majistret telah memutuskan dan memerintahkan, selain dari tanah ini diserahkan balik kepada plaintif, bahawa defendan dikenakan juga membayar 'mesne profit'; tetapi adalah didapati di dalam memo ulangbicaranya ke Mahkamah Tinggi, defendan tidak menyentuh tentang perintah yang menghendaki ia membayar 'mesne profit'. Bahkan peguam plaintif berkata, di dalam hujah-hujahnya di hadapan saya, peguam defendan tidak membangkitkan hal ini. Oleh itu, plaintif berkata adalah kesimpulannya bahawa pihak defendan menerima hakikat bahawa ia diwajibkan membayar 'mesne profit'.

27 *Halsbury's Laws of England* (Cetakan 4) perenggan 255 bersabit dengan 'mesne profit' berkata:

> Tuan tanah boleh memperolehi, dengan membuat tindakan menuntut 'mesne profit', gantirugi yang telah dialaminya kerana tidak mendapat balik tanahnya ... atau jika kerugian yang sebenarnya (actual damage) tidak dapat dibuktinya disebabkan pencerobohan defendan, pihak tuan tanah boleh memperolehi, sebagai 'mesne profit', jumlah harga pasaran bangunan (premises) itu yang bebas (open market), semasa ianya diduduki menyalahi undang-undang oleh defendan ... 'Mesne profit', sebagai satu jenis gantirugi, terbit dari perbuatan menceroboh, boleh diperolehi cuma terhadap penetapan defendan yang berlanjutan (continued occupation), setelah *haknya di segi undang-undang* (legal right) menduduki tanah itu telah *berakhir*. (Tekanan oleh saya.)

Keputusan yang dibuat oleh saya, mengikut prinsip yang dinyatakan oleh *Inward* v *Baker*[1] ialah bahawa defendan mempunyai lesen ekuiti menduduki tanah plaintif dan ia tidak boleh dikeluarkan melainkan setelah pampasan dibayar. Ini bermakna, setelah mahkamah memutuskan bahawa pampasan hendaklah dibayar, maka dari saat itu hak defendan menetap di tanah plaintif sudah luput.

Keputusan memberi pampasan kepada defendan itu telah dibuat oleh saya, pada 28 Oktober 1983; maka pada pendapat saya hak defendan menduduki tanah itu telah berakhir pada masa itu dan jika ia masih mendudukinya maka 'mesne profit' haruslah dikenakan dari tarikh itu. Tetapi, saya difahamkan bahawa, sungguhpun saya telah memutuskan bahawa plaintif membayar defendan pampasannya, ia masih terus menetap di tanah tersebut

sehingga ke hari ini. Mungkin tindakan itu dibuat kerana ia telah seterusnya membuat rayuan ulangbicara terhadap keputusan saya itu kepada Mahkamah Agung, tetapi ternyata rayuan itu adalah berkenaan dengan jumlah pampasan yang telah diputuskan oleh saya sahaja dan bukan atas keputusan saya keseluruhannya, iaitu bahawa hak plaintif rnengusir defendan adalah tertakluk kepada plaintif membayar pampasan kepadanya. Oleh kerana mahkamah telah memutuskan bahawa pampasan harus dibayar, maka haknya menduduki tanah plaintif tidaklah lagi wujud. Samada ia berjaya atau tidak memperolehi pampasan yang lebih di dalam ulangbicaranya di Mahkamah Agung itu nanti tidak akan menukar kedudukannya bahawa ia diwajibkan keluar dari tarikh keputusan saya itu dibuat.

Saya memutuskan, oleh itu, bahawa defendan dikenakan membayar 'mesne profit' dari tarikh 28 Oktober 1983 hingga tarikh ia berundur dari tanah tersebut. Saya memutuskan jua bahawa defendan dikenakan bayaran kos.

*Permohonan dibenarkan.*

Peguam: *Syarikat Sivam; CS Saini & Associates.*

Dilapurkan oleh *Prof Ahmad Ibrahim*

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## Mohamed Abu Bakar s/o Yusof v PA Syed Aboothahir s/o P Ahmed

HIGH COURT (PENANG) — CIVIL APPEAL NO 4 OF 1982
EDGAR JOSEPH JR J
2 AUGUST 1989

*Civil Procedure — Pleadings — Particulars — Appeal — Point taken not raised at trial or in memorandum of appeal — Costs — Discretion of court — Whether successful party should be denied costs*

*Evidence — Documentary evidence — Maker of document not called as witness — Hearsay — Evidence Act 1950, s 32*

*Landlord and Tenant — Tenancy of premises granted to sole proprietor of a business — Sole proprietor a partner of another business on the same premises — Whether tenancy an asset of the other business — Death of tenant — Effect on tenancy — Whether tenancy devolved upon alleged widow of tenant — Mesne profits — Quantum — Assessment — Civil Law Act 1956, s 28(4) — Control of Rent Act 1966, s 16*

The plaintiff had brought an action in the magistrate's court for an order, inter alia, to eject the defendant from premises of which the plaintiff was the registered proprietor. The sole question for determination was whether the defendant occupied the premises as a trespasser or as a tenant or as a licensee. The plantiff testified that he had rented out the premises to one KK Abdul Majid who carried on business as a sole proprietor at the premises under the name and style of 'KK Kather Mohideen Brothers'. There was another business carried on at the premises under the name of 'KK Textiles' whose partners were Abdul Majid and the defendant. The rent receipts were made out in the name of 'KK Kather Mohideen Brothers' and after the death of Abdul Majid, the defendant had tendered rent payments for the months of May, June and July 1979 but these were refused by the plaintiff. After the death of Abdul Majid, the defendant asked the plaintiff for consent to occupy the premises but the plaintiff refused. The defendant also said that upon the death of the deceased his alleged widow wished to continue the business of KK Textiles and to that end had executed a power of attorney in favour of one Mohamed Sidik.

The defendant contended that: (1) the tenancy was an asset of the firm of KK Textiles of which the deceased and the defendant were partners and so they were joint tenants of the plaintiff; and (2) alternatively, if the deceased alone had been the tenant, the defendant had been on the premises by the leave of the deceased, upon whose death the widow of the deceased succeeded to the tenancy by reason of the provisions of s 16(2) of the Control of Rent Act 1966, and as the defendant continued to occupy the premises with the leave of her attorney Sidik, the defendant was in law a licensee and accordingly, until her tenancy was determined, no action for trespass was maintainable against him. In his defence, he did not plead specifically the devolution of his tenancy as alleged in his evidence. Nor did he plead by way of alternative or at all that he was a licensee.

The magistrate gave judgment for the plaintiff but with no order as to costs. The plaintiff had prayed for vacant possession, damages for wrongful occupation from 1 July 1979 until possession was given, and for costs. The magistrate did not quantify the damages nor did she state for what period it was to run. She gave no reason for denying the plaintiff his costs.

The defendant appealed and the plaintiff cross-appealed to the High Court. In the High Court, the defendant raised a further point, namely, that at the time of the death of the deceased the Control of Rent Act 1966 (which abolished statutory tenancies) was in force with the result that the deceased's contractual tenancy became vested in the official administrator and unless there was a determination thereof by service of a valid notice to quit on the official administrator, the claim for possession against the defendant was not maintainable.

**Held,** dismissing the defendant's appeal and allowing the plaintiff's cross-appeal:

(1) There was not a scrap of evidence that the tenancy of the premises formed part of the assets of the firm of KK Textiles. On the contrary, there was ample evidence, including the contemporary receipts, which showed that the tenancy concerned had been granted to the deceased in his business name of KK Mohideen Brothers of which he was the sole proprietor. The defendant was not a joint tenant of the premises whose tenancy continued.

(2) The contents of the power of attorney as to the status of the alleged widow were inadmissible as evidence, being hearsay. No attempt was made to satisfy the requirements of s 32 of the Evidence Act 1950. The power of attorney was executed after the matters in controversy in the suit had arisen and its maker, the alleged widow, stood to benefit if the action against the defendant were dismissed. It could not therefore be said that there was an absence of motive to misrepresent. In the result, there was not a scrap of evidence that the deceased and the alleged widow were married to each other.

(3) Without proof of the marriage, the alleged widow held no tenancy of the premises in the first place and so was in no